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Legality of 'Deep Linking' Remains Deeply Complicated

By CARL S. KAPLAN
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When a federal judge issued a decision last week in a case involving "deep linking," many reports suggested that the controversial Internet practice was now unambiguously legal. But the story is more complex than that. In fact, deep linking -- the practice of linking to a page deep inside another Web site, bypassing its home page -- still appears to be in legal limbo.

The latest confusion about linking stems from a seven-page decision issued on March 27 by Judge Harry L. Hupp of Federal District Court in Los Angeles in the closely watched case of Ticketmaster Corp. v. Tickets.com Inc.

Ticketmaster Online-CitySearch Inc. and its majority shareholder Ticketmaster Corp. operate a Web site offering event tickets that Ticketmaster has an exclusive right to sell. The site's home page features advertisements and a directory of interior event pages, which have basic information like a concert's time, place and date. They also include information about how to order tickets through the site or by other means.

Ticketmaster and Ticketmaster Online sued a rival company, Tickets.com, last July in United States District Court for the Central District of California. Ticketmaster claimed that the Tickets.com site featured "thousands" of links that transported consumers to selected event pages deep within Ticketmaster's own site, bypassing its home page and other pages.

The suit also claimed that through the use of automatic software "spiders," Tickets.com systematically copied and extracted protected editorial material from Ticketmaster Online's event pages and placed it in a new form on Tickets.com pages. The suit also accused Tickets.com of publishing false and misleading information about Ticketmaster's ticket availability.

Ticketmaster said that Tickets.com's deep linking was wrong and harmful for several reasons. First, it claimed that the practice violated key sections of its "terms and conditions" -- legal fine print on the site that prohibits "commercial use" of the Ticketmaster pages and also bans unauthorized linking.

In addition, Ticketmaster contended that deep linking interfered with its

economic relationships with advertisers, who paid handsomely to advertise on the site's home page. Finally, the company said that Tickets.com was guilty of "passing off" and "reverse passing off" -- forms of unfair competition -- because consumers might confusingly conclude that Ticketmaster and Tickets.com were connected in ways detrimental to Ticketmaster and beneficial to Tickets.com.

This is not the first time that Ticketmaster has gone after a deep linker. It sued Microsoft for alleged deep-linking wrongs at its Sidewalk city guides a few years ago. The companies settled last year.

In response to the latest lawsuit, Tickets.com denied any wrongdoing. It also filed a motion to dismiss all 10 of Ticketmaster's legal claims, which addressed linking and non-linking conduct. It was in the context of ruling on the preliminary "motion to dismiss" that Judge Hupp issued his order last week, allowing some claims to proceed and dismissed others.

Some media reports on the decision emphasized Judge Hupp's comment that "hyperlinking does not itself involve a violation of the Copyright Act (whatever it might do for other claims) since no copying is involved." And in another part of his opinion, Judge Hupp concluded that "deep linking by itself (i.e., without confusion of source) does not necessarily involve unfair competition."

These comments appear to suggest that linking has a green light, at least as far as Hupp is concerned. But viewed in the context of the entire ruling, the statements are quite limited. For one thing, Ticketmaster did not claim in its complaint that deep linking was copyright infringement, so the court's comment in that regard was not greatly meaningful.

Also, Judge Hupp allowed a few claims that attack deep linking to proceed. For example, he allowed the passing-off and reverse-passing-off claims to remain, as well as the interference claim. And although he dismissed the breach of contract claim, he granted Ticketmaster permission to file an amended complaint with facts showing that its "terms and conditions" created an enforceable contract, seen and agreed to by Tickets.com. A lawyer for Ticketmaster said the company will file an amended complaint shortly that "we believe will satisfy the court's requirements."

Indeed, it can fairly be said that Judge Hupp left the door open for a link-averse Web operator to ban linking via a contract that a Web surfer is forced to agree to before being allowed to enter a site. He implied that those who deep link in violation of this conspicuous and assented to "agreement" would have a potential breach of contract problem on their hands.

In short, the linking controversy continues. The next turn in the case may occur next month, when Ticketmaster is scheduled to argue that the court should preliminarily stop Tickets.com from linking and spidering.

"I certainly don't think that this is a conclusive decision that says 'linking is O.K.," which a number of people have characterized it as," said Jessica R. Friedman, a lawyer with Reboul, MacMurray, Hewitt, Maynard & Kristol in New York who specializes in intellectual property and the Internet.

"The way I read this is, that when you run through all the claims, and after you consider what the judge left in, deep linking under this ruling may constitute passing off, reverse passing off, tortious interference and even breach of

contract," she said, adding that she believes it may be difficult for Ticketmaster to actually win on its linking claims.

For now, Friedman said that she is advising her clients that it is fine to link to another's home page, but not to deep link without permission. "The law on linking is still in a gray area," she said.

Charles Conn, chief executive of Ticketmaster Online, said in an interview that his company was generally in favor of linking, but he drew the line at deep linking when it is "wholesale and systematic," employed by "a direct competitor" and coupled with other conduct that he deemed objectionable, like spidering.

Some people who use the Internet have a "knee-jerk" viewpoint that any type of law restricting linking is wrong, Conn said. But "the Net is mature enough now that we should be able to make distinctions" regarding types of deep-linking conduct, he said.

Mark Sableman, a partner and intellectual property expert at Thompson Coburn, a St. Louis law firm, agreed that Judge Hupp's ruling was rather limited. But he said that some of the court's statements may be picked up by other courts in other cases.

"Judge Hupp at one point said that a link is a kind of library card that directs you to a reference," Sableman said. "That's a very useful analogy to think with. It shows that a link does not create a deliberate association that allows someone to bask in another's glory, but rather is an automated service that beams you to where you want to go."

Jeffrey R. Kuester, an Internet law specialist and partner at the Atlanta law firm Thomas, Kayden, Horstemeyer & Risley, said he hoped that Judge Hupp would tread carefully as the Ticketmaster case progresses.

"You will have a chilling effect on all kinds of linking if you say that certain types of linking are bad," he said.

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